Supreme Court, U.S.
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No. 88-1329

IN THE SUPREME COURT OF THE UNITED STATES

October Term. 1988

In Re Pedro Delgado, Elia Gregorio, Marcelo Llanes and Marta R. Torres, Petitioners

Brief For Non-governmental Respondents In Opposition To Petition For Writ of Mandamus

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QUESTION PRESENTED FOR REVIEW

Being dissatisfied with the questions posed by petitioners, non-governmental respondents suggest to the Court that the question presented in this petition is:

Where a three-judge panel is not required by statute or case law to hear claims brought by individuals under sections 4(f)4 and 203 of the Voting Rights Act, did both the Courts of Appeals for the Eleventh Circuit and the District Court err in fully adjudicating and denying petitioners' claims of violations of those sections without invoking a three-judge panel?

LIST OF AFFILIATED CORPORATIONS

Pursuant to Rule 28.1, non-governmental respondents hereby state that other than the non-profit corporations listed below, there are no corporations affiliated with non-governmental respondents:

U.S.ENGLISH Foundation, Inc.

U.S.ENGLISH Legislative Task Force, Inc.

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JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. The court of appeals denied rehearing on December 19, 1988. The petition for writ of certiorari and the petition for writ of mandamus were filed on February 9, 1989. The jurisdiction of this Court to grant a writ of mandamus was invoked under 28 U.S.C. §1651(a).

Respondents note that the trial of this matter indicated a serious question of whether petitioners have standing to bring this action. Although petitioners claimed that they were harmed by not having sufficient advance notice of the circulation of the English-language petitions which were the subject of this proceedings, Petitioners' Petition for Writ of Certiorari, No. 88-1327, at 6, trial testimony demonstrated conclusively that petitioners and many others had notice of the petition and its contents many months before the initiative was qualified for the ballot. *See, e.g., In re: Advisory Opinion to the Attorney General: English - The Official Language of Florida*, 520 So.2d 11 (Fla. 1988)(fifteen organizations filed amicus briefs in opposition to proposed initiative). In fact, petitioners' expert witness testified that his efforts to organize opposition to the initiative were unsuccessful solely due to apparent apathy in the community; this lack of opposition was confirmed when the initiative received 84 percent of the vote in the November 1988 election.

In addition, as discussed *infra*, petitioners failed to raise this issue before the Court of Appeals so the Court could review the District Court's finding that the statutes do not require a three-judge panel for this case.

STATEMENT OF THE CASE

This case involves an initiative to amend the Florida constitution to declare English the state's official language. The initiative was adopted by the voters of Florida by a vote of 84-16%.

This petition asks whether both the Court of Appeals for the Eleventh Circuit and the United States District Court for the Southern District of Florida properly denied petitioners' request for a three-judge court. This request oversteps the facts. Petitioners mentioned this issue in a footnote in their brief to the Court of Appeals, but did not ask that court to rule on the three-judge panel issue. Petition for Writ of Mandamus (hereinafter Pet.) at 7.

Petitioners, who filed this action less than a month before the election and who requested and received expedited consideration of this matter, now claim that the "expedited nature of the appeal" was the reason the Eleventh Circuit never had a chance to rule on this issue. *Id.* In fact, the Eleventh Circuit gave petitioners substantial leeway in bringing and prosecuting their appeal, yet petitioners never raised the three-judge panel issue in a manner so that the Eleventh Circuit could rule on the question. That task was left to the United States Department of Justice, which fully apprised the Eleventh Circuit of its view on this question. *Id.* at 7-8

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO MEET THEIR BURDEN UNDER 28 U.S.C. § 1651(a) AND SUPREME COURT RULE 26.

Petitioners contend that the Court should issue a writ of mandamus because exceptional circumstances warranting the exercise of the Court's discretionary powers exist. *See* Pet. at 8. In addition, the petitioners contend that they have no other adequate means to attain the relief they desire and that their right to issuance of the writ is clear and indisputable. *See id.* at 9. An analysis of the applicable law, however, indicates that petitioners' contentions are wholly without merit and that their petition for a writ of mandamus should, therefore, be denied.

The issuance of a writ of mandamus is a drastic and unusual remedy reserved for extraordinary cases. *See, e.g., Will v. United States*, 389 U.S. 90 (1967); *Bankers Life Co. v. Holland*, 346 U.S. 379 *Ex parte Fahey*, 332 U.S. 258 (1947); *Parr v. United States*, 351 U.S. 513 (1956). Moreover, the Court has emphasized that a writ of mandamus should be restricted to the most extraordinary situations in order to avoid piecemeal appellate litigation, particularly in an era of excessively crowded lower court dockets. *See Kerr v. United States Dist. Court*, 426 U.S. 394 (1976). Therefore, unless petitioners can "clearly and indisputably" show that the writ of mandamus will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court, the

Court must abstain from issuing the writ. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that petitioners must establish that their "right to issuance of the writ is clear and indisputable"); *Kerr, supra.*

A. Granting a Writ of Mandamus for a Three-Judge Panel Will Not Aid the Court's Appellate Jurisdiction

In the present case, the petitioners have failed to show how granting a writ of mandamus will be in aid of the Court's appellate jurisdiction. *Marbury v. Madison,* 1 Cranch 137, 175 (1803). In fact, their brief is virtually silent on this issue.[1] However, despite their silence, the record indicates that mandamus will not aid the appellate jurisdiction of the Court because the merits of petitioners' case are already before the Court on a petition for writ of certiorari. *Delgado v. Smith*, No. 88-1327.

Moreover, the issues of petitioners' case, which from the outset have been legal in nature, have already been sufficiently sharpened for the Court by four district court judges and six appellate court judges in four different states. *See Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. 1988), *aff'd Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988); *Montero v. Meyer*, 861 F.2d 603, (10th Cir. 1988); *Montero v. Meyer,* 696 F.Supp. 540

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1 The only reference to any procedural error involving three-judge panels allegedly committed by the district court in the proceedings below is found on page 3 footnote 2 of petitioners' brief before the Eleventh Circuit. See Pet. at 7. Petitioners, however, did not raise the issue in their appeal to the Eleventh Circuit, choosing instead to have the circuit court render a decision on the merits.

(D.Colo. 1988); *Zaldivar v. City of Los Angeles,* 590 F.Supp. 852 (C.D. Cal. 1984), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986); *Gerena-Valentin v. Koch*, 523 F.Supp. 176 (S.D.N.Y. 1981).

Furthermore, the deliberations of the courts below indicate that the petitioners have fully and fairly litigated the merits of their case. *See id.* The petition does not argue that petitioners failed to receive full and fair review from the courts below. To the contrary, petitioners received all of the the review they asked for, despite the fact that "[t]he overly broad interpretation of the Act urged by the [petitioners] has been rejected by every court squarely to face the issue." *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988), reprinted in petitioners' Appendix to Petition for Writ of Mandamus (hereinafter Pet. App.) at A7.

B. There are No Present Exceptional Circumstances Warranting the Exercise of the Court's Discretionary Powers

The Court should abstain from granting a writ of mandamus because there are no exceptional circumstances in this case which warrant the exercise of the Court's discretionary powers.[2] Specifically, the Voting Rights Act ("Act") gives private citizens no right to adjudication by a three-judge district court in claims brought under sections 203 and 4(f)(4) of the Act.[3] *See* 42 U.S.C. §1973b(f)(4); 42 U.S.C. §1973 aa-1a(c); 42 U.S.C. §1973 aa-2.

Assuming *arguendo*, that Congress intended to permit private enforcement of the Act's bilingual provisions, it certainly does not follow that Congress also intended that these private enforcement actions be heard by three-judge district courts. On the contrary, the strong disfavor of three-judge panels supports the opposite position. *See* Burger, The State of the Federal

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2 Especially when petitioners did not ask the Eleventh Circuit to examine Judge Kehoe's finding that the statutes do not require a three-judge panel in this case. Pet. App. at A31, 47; Pet. at 7.

3 The language of both sections 203 and 4(f)(4) is substantively identical. Pet. at 2. Section 204 of the Act provides the Attorney General with the right to adjudication by a three-judge court under section 203, but, despite numerous amendments to this section, Congress has refused to extend that right to private citizens.

The Voting Rights Act contains no express private right of action. Nevertheless, lower courts, following *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), have extended an implied private right of action from Section 5 of the Act to the bilingual provisions in sections 203 and 4(f)(4). *See, e.g., Montero, supra*; *Zaldivar, supra*; *Genera-Valentin, supra.*

Judiciary, 58 A.B.A.J., 92 S.Ct. 2921, 1053 (1972) ("[t]he original reasons for establishing these special courts, whatever their validity, no longer exist."). In fact, "[t]he only recommendation upon which there has been unanimous accord among the Study Group, the Hruska Commission, the Court, and the commentators is the elimination of most of the exceptions to the Court's discretionary jurisdiction, and in particular to the provisions for three-judge district courts and direct appeals therefrom to the Supreme Court." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 47 (5th ed. 1978). Not surprisingly, the petitioners have failed to produce a single case which holds that private actions brought under sections 203 and 4(f)(4) must be heard by three-judge district courts.

However, even if the Court found that there was such a right under Section 203, there is every indication that the district court proceeded properly in this case under Section 4(f)(4). *See* Amicus Brief for the United States in the court below (partially reprinted in Petition for a Writ of Certiorari in *Montero v. Meyer*, No. 88-6376, at 41a [hereinafter *Montero* Petition]).

C. The Petitioners Have Failed to Show That Adequate Alternative Relief Cannot be Had

Petitioners' appellate brief before the circuit court requested that the Eleventh Circuit should accept jurisdiction over the appeal and reverse the district court's disposition of the merits. *See* Pet. at 7. In other words, the argument petitioners advance here – that the court of appeals was without jurisdiction to affirm the district court's disposition of the merits because the district court failed to convene a three-judge court – is totally

inconsistent with their previous invocation of jurisdiction at the circuit court. In fact, the petitioners conspicuously failed to raise this jurisdictional issue to the court below; raising it at this level is an attempt to get another bite at the apple.[4] *See McLucas v. De Champion*, 421 U.S. 21, 30 (1975) ("[W]e have held that, when a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals.").

However, even if petitioners had properly raised their jurisdictional argument before the circuit court, the argument would have failed. As the United States correctly pointed out in their amicus brief below, there is every indication that the district court proceeded properly in this case under Section 4(f)(4) of the Voting Rights Act which does not require a three-judge court even for actions brought by the Attorney General. *See Montero* Petition at 45a. The position of the United States was that the district court properly proceeded to

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4 Although the petitioners rely on *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930), in arguing that mandamus is the only remedy available, this Court has modified *Stratton* by holding that when a single district judge fails to call for the convention of a three-judge court and disposes of the case, appeal lies only to the court of appeals. *See, e.g., McLucas v. De Champlain*, 421 U.S. 21 (1975); *Hicks v. Pleasure House, Inc.*, 404 U.S. 1 (1971). The overwhelming majority of commentators have concluded that decisions such as *McLucas* and *Hicks* indicate that the Court has retreated from *Stratton*. *See, e.g.*, 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice 421.03[7] (2d ed. 1980); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction 2d Sec. 4040 (2d ed.1988); Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299 (1963).

dispose of this case under section 4(f)(4) without having to convene a three-judge panel, and, that having done so, the circuit court had jurisdiction to decide whether the ruling below was in error. *See id.* Thus, petitioners' argument that the court of appeals was without jurisdiction to affirm the district court's disposition of the merits is inconsistent with their position below; more important, their argument is legally deficient and procedurally flawed.

In short, the petitioners have clearly failed to meet their burden for the requested writ of mandamus under 28 U.S.C. §1651(a) and Sup. Ct. R. 26. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that petitioners must establish that their "right to issuance of the writ is clear and indisputable"). Specifically, they have failed to establish that granting a writ of mandamus will be in aid of the Court's appellate jurisdiction; that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers; and that adequate relief cannot be had in any other form or from any other court.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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